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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JAMES H. CUNNINGHAM,

12 Plaintiff,

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14 vs.

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16 JOHN MARSHALL,

17 Defendant.  
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CASE NO. 07cv2183

**ORDER GRANTING EXTENSION  
OF TIME TO FILE OBJECTION  
TO REPORT AND  
RECOMMENDATION AND  
DENYING PETITIONER'S  
MOTIONS FOR APPOINTMENT  
OF COUNSEL**

[Docs. 81, 82 & 84]

20 On May 25, 2010, Magistrate Judge Barbara Lynn Major issued a Report and Recommendation  
21 ("R&R") denying Petitioner James H. Cunningham's ("Petitioner's") Petition for Habeas Corpus  
22 pursuant to 28 U.S.C. § 2254. Petitioner's objections to the R&R were originally due on or before  
23 June 16, 2010. On July 1, 2010, this Court granted Petitioner an extension of time to file his  
24 objections, until August 27, 2010. Petitioner now seeks an additional sixty day extension to file his  
25 objections. Petitioner's request is granted. Petitioner shall file his objections to the R&R no later than  
26 **November 1, 2010.** Defendant shall file his reply no later than **November 22, 2010.**

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1           Petitioner has also filed two motions for appointment of counsel, one titled “Appointment of  
2 Counsel for the Incompetent” and one titled “Appointment of Counsel for the Indigent.” Petitioner  
3 has previously filed similar motions seeking counsel. On August 1, 2008, Magistrate Judge Ruben  
4 Brooks denied Petitioner’s request for counsel. (Doc. 34.) The magistrate judge found Petitioner had  
5 not produced substantial evidence of incompetence to be appointed a guardian ad litem or counsel.  
6 (Doc. 34 at 6.) Specifically, after a review of Petitioner’s medical records, the magistrate judge  
7 concluded that “Petitioner suffers from depression and anxiety, and he has been regularly prescribed  
8 antidepressant medication while he has been in prison. Nevertheless, his doctors consistently indicated  
9 that his cognition and thought processes were within normal limits, he was focused and coherent, and  
10 he had only mild limitations in social functioning.” (*Id.*) Further, the magistrate judge found that the  
11 interests of justice did not require appointment of counsel because Petitioner had adequately presented  
12 his claims in his Amended Petition. (*Id.* at 8-10.)

13           On December 31, 2008, Petitioner filed another motion to appointment counsel on the grounds  
14 that he was indigent. (Doc. 51.) He also moved for reconsideration of Magistrate Judge Brooks’  
15 previous ruling. (Doc. 53.) On January 15, 2009, Magistrate Judge Barbara Major denied Petitioner’s  
16 request for reconsideration. (Doc. 54.) The magistrate judge found that Petitioner had not submitted  
17 new evidence indicating he was incompetent or that he had difficulty understanding court orders. (*Id.*  
18 at 4.) The magistrate judge also found that Petitioner’s claims of indigency did not warrant  
19 reconsideration of the previous ruling that the interests of justice did not require appointment of  
20 counsel. (*Id.* at 5.)

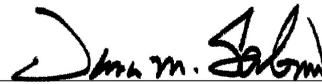
21           Petitioner now contends he needs counsel because he is “triple CMH and is under five different  
22 medications and finds it impossible to defend himself.” (Doc. 81.) Other than this statement,  
23 Petitioner does not submit any evidence of incompetence, such as medical records or sworn  
24 declarations. “A party proceeding pro se in a civil lawsuit is entitled to a competency determination  
25 when substantial evidence of incompetence is presented.” *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th  
26 Cir. 2005). Substantial evidence of incompetence may include evidence that a petitioner “suffers from  
27 a mental illness, the mental illness prevents him from being able to understand and respond to the  
28 court’s order, and he was still suffering from the illness during the relevant time period.” *Id.* Here,

1 Petitioner has not put forth substantial evidence of incompetence, and indeed, has shown that he is able  
2 to understand and respond to the Court's orders. Accordingly, Petitioner's motion is denied.

3 Petitioner also seeks counsel on the grounds that he is indigent. Under 18 U.S.C. §  
4 3006A(a)(2), the district court may appoint counsel for financially eligible petitioners seeking relief  
5 under 28 U.S.C. § 2241 when the interests of justice so require. The court considers whether there is  
6 a likelihood of success on the merits of the petition and whether the unrepresented petitioner has the  
7 ability to articulate his claims in light of the complexity of the issues presented. *Weygandt v. Look*, 718  
8 F.2d 952, 954 (9th Cir. 1983). In this case, the interests of justice do not require appointment of  
9 counsel. Petitioner's motion is denied without prejudice.

10 **IT IS SO ORDERED.**

11 DATED: August 30, 2010



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13 HON. DANA M. SABRAW  
14 United States District Judge  
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